No. 3697

United States Circuit Court of Appeals

For The Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,
Husband and Wife,
Defendants in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge.*

BRIEF OF DEFENDANTS IN ERROR

JAMES P. WETER,
F. M. ROBERTS,
WM. G. LONG,
Attorneys for Defendants in Error.
1012 Lowman Building, Seattle, Washington.

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STATEMENT.

Plaintiff in error commenced an action against defendants in error alleging that on or about the 27th day of November, 1918, the United States Shipping Board Emergency Fleet Corporation paid defendants in error by mistake the sum of $2508.78.

Defendants in error demurred to the complaint in said action on the grounds:

1. That there is a defect in parties plaintiff.

2. That said action was not commenced within the time limited by law.

3. That the same does not state facts sufficient to constitute a cause of action.

Only the first ground was considered or passed upon and, therefore, the only matter at issue on this appeal is the correctness of the ruling upon that ground. The Court sustained the demurrer in the following opinion:

> "From the terms of the Shipping Board Act and the incorporation act of the District of Columbia, I am of the opinion that an intention is shown on the part of Congress that suits by the Emergency Fleet Corporation should be brought in its own name; that the discretion or authority to prosecute suits otherwise does not reside elsewhere."

Petition for rehearing was denied and dismissal of defendants in error was granted. The contention of the defendants in error was and is *that the United States Shipping Board Emergency Fleet Corporation is a distinct and separate entity apart from the government of the United States; that suits by said corporation should be brought in its own name, and that discretion or authority to prosecute suits otherwise does not reside elsewhere.*

The contentions of the plaintiff in error are:

1. That the United States was the real party in interest.

2. That the United States Shipping Board Emergency Fleet Corporation was a governmental arm, or agency of the United States.

3. The Act of Congress of June 5, 1920, transfers to the United States Shipping Board, an admitted governmental agency, all contracts, rights, interest and remedies accruing, or to accrue, in pursuance of any provision of the Shipping Act of 1916 or the Merchant Marine Act of 1920, and specifically directs that said Board settle, adjust and liquidate all matters arising out of or incident to the exercise by, or through, the President of any of the powers or duties conferred upon the President by the Shipping Act of 1916.

The first two contentions of plaintiff in error will be treated together in this brief for the reason that they mean practically one and the same thing. If the second contention be sound, the first would be sound as a matter of course, and if the second be erroneous, then likewise the first would be erroneous also.

The third contention of plaintiff in error will be treated separately.

ARGUMENT.

I.

The United States Shipping Board Emergency Fleet Corporation is not such an agent, or governmental department, as to make the United States the real party in interest in suits such as this arising out of business dealings had between the Emergency Fleet Corporation and defendants in error.

The erroneous impression has arisen that this corporation was in fact a governmental department, or arm, because of the fact that the corporation functioned for the first time during the recent war, and because it had delegated to it considerable powers originally granted to the President by Congress; but if we go back to the very inception of the law authorizing this corporation we readily can ascertain that Congress never intended that it be a governmental department or arm.

Bear in mind that the act authorizing the Emergency Fleet Corporation, the Shipping Act of September 7, 1916, was submitted to Congress for discussion May 16, 1916, almost a year before the declaration of war. This act was but the culmination of a series of attempts made for many years past to extend aid in re-establishing a prosperous United States Merchant Marine. Even a cursory reading of the discussion centering around that bill reveals that the two main purposes thereof were:

1. To extend our commerce.
2. To provide naval auxiliaries in time of war.

It was largely a commercial venture,—a business

proposition. War at that time was not seriously contemplated.

It is interesting to note that from the speeches in the House of Representatives made by the proponents of the Bill before it became a law, nothing seemed farther from their minds than that they were creating in the Emergency Fleet Corporation a governmental department such as plaintiff in error contends was created. They took particular pains to assure those who opposed government ownership, that government ownership was not intended.

> "The government ownership feature of this Bill is limited. The possibility of government operation under the pending measure bears the same relation to the balance of the Bill that a single grain of cockle would bear to a full measure of wheat."
>
> Representative Sanders of Virginia.
>
> Congressional Record p. 8103, May 16, 1916.
>
> "Granting for the sake of argument that government ownership of vessels is objectionable, yet if there is any feature in this Bill, any feature of government ownership, it contains in itself the means for the automatic elimination of all government ownership."
>
> Representative Burke of Wisconsin.
>
> Congressional Record p. 8091, May 16, 1916.
>
> "Its sole aim and enterprise is to provide the country with shipping facilities absolutely nec-

essary to carry on its commerce with other nations of the world."

Representative Lazaro of Louisiana.

Congressional Record p. 8103, May 16, 1916.

"This is not a political question,—this is a great business proposition which any man who has any products to ship to foreign countries is interested in."

Representative Miller of Pennsylvania.

Congressional Record p. 8071, May 16, 1916.

"Another provision that they (the minority) did not approve, was that in reference to the government operation of ships. * * * If you look at Section 11 of the Bill, you will see that it provides that after five years the operation of ships under the corporation in which the government may own a majority of the stock, shall cease. That concession was made to those who opposed permanent government operation of ships. We further provided that these foreign-built ships, and ships operated by a corporation in which the government is the owner of stock, may not be used in Coastwise trade. * * * As we wished to demonstrate that we have no intention to discourage private capital from investing in shipping for fear of competition by the government controlled lines, we wrote that provision in the bill."

Representatives Alexander.

Congressional Record p. 8079, May 16, 1916.

Not only was the bill advocated because it was

a business proposition, but it was even opposed for the same reason.

> "I shall vote against this Bill because the sole argument in its favor is that it is necessary to create a great Merchant Fleet * * * to be run as a government trading venture."
>
> Representative Siegel of New York.
>
> Congressional Record Appendix 999, May 16, 1616.

These extracts, together with the extended debate of which they are a part, clearly indicate that Congress in passing the law providing for the Emergency Fleet Corporation did not have in mind the creation of a governmental department for the exercise of administrative functions, but did have in mind the creation of an independent corporation aided by the government to assist the commerce of the United States in establishing itself against foreign competition—purely a commercial venture.

The law itself provided (Sec. 11 Shipping Act 1916—8146-F U. S. Compiled Statutes annotated) that the United States Shipping Board might organize a corporation under the laws of the District of Columbia in which the government should hold at least 51% of the stock and private parties might hold 49%, and that this corporation might build, lease and charter ships in foreign commerce. The corporation laws of the District of Columbia, under which the corporation was to be created, provide:

> "* * * When the certificate shall have been filed * * * they shall be a body poli-

tic * * * capable of suing and being sued in any Court of law or equity in the District."

Code, District of Columbia, Sec. 607, p. 159.

As further evidence that Congress never intended the Emergency Fleet Corporation to be a governmental department, in the Uurgent Deficiencies Bill for the year ending June 30, 1918, treating of the question of civil service employes, Congress inserted this provision: "That the United States Shipping Board Emergency Fleet Corporation shall be considered a government establishment for the purposes of this section." Sec. 7, chap. 79, Comp. Stat. Ann. Supp. 1919, Sec. 251-B.

Had Congress considered the Emergency Fleet corporation a governmental department, such legislation would have been entirely unnecessary. By thus centering it out, and specifying that for this particular purpose it be considered a government establishment, Congress certainly made it plain that for all other purposes the corporation should not be so considered.

Thus we have the members of Congress continually referring to this law as a business proposition, the corporation itself organized as any other commercial body, capable of suing and being sued, and 49% of its stock capable of being owned by private parties. If Congress really intended this corporation to be a governmental department, or a mere government arm—immune from suit and incapable of suing, it could have done so. But by having clothed it with powers of suing and being

sued, and having provided for the issuance of stock to private parties, as in other private corporations, it impliedly consented that it and its stockholders be regarded as any other corporation and its stockholders. It follows, therefore, that the fact that the United States is a stockholder in the corporation does not make the United States the real party in interest in this case, even though it hold a majority of the stock. The fundamental nature of the corporation remains unchanged.

Bank of United States vs. Planters Bank of Georgia, 6 L. Addn. 244.

"It is, we think, a sound principle that, when a government becomes a partner in any trading company, it divests itself, so far as concerns the transaction of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the

privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act."

Not only does Congressional intent, as expressed in the events leading up to the passage, and expressed in the bill itself, oppose the theory that the Emergency Fleet Corporation is a governmental department, but by far the greater weight of judicial opinion is opposed to such interpretation. In the case of

Commonwealth Finance Corporation vs. Landis (*Emergency Fleet Corporation, Garnishee*), 261 Federal 440,

the Emergency Fleet Corporation sought immunity from garnishment on the grounds that it was in fact the United States. Judge Dickinson in denying such immunity, stated at page 443:

"There is this very practical and commonsense view of the broad question here involved and of the general situation presented. Private persons and inviduals must deal with this corporation as contractors or otherwise in the accomplishment of the work with which the corporation has to do. Supplies or materials must be furnished to the corporation and to those who have contracted with it. Obligations of some kind to make payment must be incurred.

Congress has found it to be best to so provide that the United States shall not directly incur these obligations. If the obligations incurred were the obligations of the United States, it has so far laid aside the robes of sovereignty as to permit the question of the existence of such obligation to be determined by the Court of Claims and within limits by the District Courts. If this remedy was pursued by any one having a claim, no matter how just that claim might be, the United States might very well interpose the defense that it had not incurred any obligation and the foregoing remedy would be denied the claimant. If the corporation was not amenable to process, then the intolerable situation would be presented that the corporation was free to admit or repudiate its obligations at its free will and pleasure.

"We are certainly justified in assuming that Congress, by its legislation on the subject, intended that the obligations which necessarily must be incurred will be met either by the United States or this corporation, and that it was further intended that the existence and extent of such obligations should be determined either as against the United States or as against the corporation, and as Congress has not seen fit to have the United States directly assume the obligation, and has not provided any way in which any questions which may

arise may be determined in favor or against the United States, the further inference is justified that Congress intended that whatever obligations were incurred were incurred by this corporation, and has further intended that such questions as arise may be determined in favor of or against the corporation."

We might add here, although the matter is not directly in issue in this appeal, that the suggestion in the foregoing opinion of the difficulty if not utter impossibility of a claimant against the Emergency Fleet Corporation ever litigating his claim against the United States, should receive the earnest consideration of this Court.

If the Emergency Fleet Corporation had sued in its own name, the defendants in error could have counter-claimed against it. But, as stated in the *Finance* case, *supra,* to compel defendants in error to litigate their counter-claims against the Emergency Fleet Corporation in an action with the United States as plaintiff would mean a virtual denial of any redress whatsoever. Such injustice should not be countenanced by this Court.

In

Gould Coupler Co. vs. United States Shipping Board Emergnecy Fleet Corporation, 261 Fed. 716,

the Emergency Fleet Corporation sought to have process set aside on the grounds of sovereign immunity from process. We quote from Judge Hand's opinion as follows, at page 717:

"Now, in these cases it appears to me too clear for dispute that the Fleet Corporation is in general capable of being sued. Section 11 of the Shipping Act (Comp. St. 8146f) provides that the corporation shall be chartered under the laws of the District of Columbia, and no one disputes that this means under its general corporations laws. The corporation was so formed under Code of Law D. C. c. 18, subchapter 4, which authorized actions by and against any corporation so organized. The Fleet Corporation was therefore meant to be a legal person without immunity quite as much as any other corporation. In view of these provisions it is unnecessary to consider any of the cases touching the general liability to process of corporations in which the United States may be a stockholder or which it may organize for governmental purposes."

and at page 718:

"* * * It must follow that in choosing the Fleet Corporation he chose it with all its limitations upon its head. In other words, Congress contemplated that possibility and expected that in so delegating his powers he must subject their exercise to the scrutiny of the customary tribunals, precisely as the Fleet Corporation's other activities were subject."

A similar holding was made by Judge Foster in *American Cotton Oil Co. vs. United States*

Shipping Board Emergency Fleet Corporation, 270 Fed. 296.

The Supreme Court of New York in the case of

Ingersoll-Rand vs. United States Shipping Board Emergency Fleet Corporation, 187 N. Y. S. 695.

refused to accept the theory that the Emergency Fleet Corporation is a governmental department or arm. We quote from the opinion at page 699:

> "The business in which this defendant corporation was to be engaged was such as had theretofore been conducted by private persons and corporations. The building, purchasing, leasing and operating of ships from time out of mind had been conducted by private enterprise. When the government decided to invest capital in such business it authorized the incorporation of a business corporation and became a stockholder therein. Such corporation, and not the government, became liable for its debts and satisfaction for such debts is to be obtained out of its property and not as a claim against the United States."

In the case of

Lord & Burnham Co. vs. United States Shipping Board Emergency Fleet Corporation, 265 Fed. 955.

the defendant claimed in defense of the suit that it was merely a governmental instrumentality, and that the action was in effect against the United States and not authorized by law. Judge Page,

Circuit Judge, in his opinion overruling such defense, stated at page 959:

> "It is not to be believed, except on the clearest evidence, that Congress, when it authorized the incorporation of the defendant under the general laws of the District of Columbia, to forward a specific, limited, and *purely commercial undertaking*, intended to take away all those corporate rights, and leave those who might deal with the corporation no place to adjudicate those rights, except in and through the slow and cumbersome processes of the Court of Claims, where over $10,000 is involved.
>
> *"Nor is it to be believed that it was intended that a corporation, whose whole capital may, under the act, be owned by private individuals, could only be proceeded against in a jurisdiction established solely for the adjustment of claims against the United States."*

The identical question was again raised in the case of

Pope vs. United States Shipping Board Emergency Fleet Corporation, 269 Fed. 319.

Judge Call citing the case of

Bank of United States vs. Planters Bank of Georgia, supra.

and case of

Sales vs. United States, 234 Fed. 842,

held the corporation to be a separate entity and not a governmental department.

In the case of

Federal Sugar Refining Company vs. United States Sugar Equalization Board, Inc., 268 Fed. 575,

the defendant was a corporation organized under the laws of Delaware, incorporated by the direction of the President, with all its stock owned solely by the government, seeking to evade liability on the ground of government immunity from suit. In sustaining demurrer to such defense Judge Mayer stated at page 587, as follows:

> "The very incorporation of defendant demonstrates that the ordinary methods of transacting business by executive departments were inadequate, and doubtless subject to embarrassment by a maze of unworkable statutes and regulations, and that the elastic powers of a business corporation would enable the purchase and sale of sugar to be engaged in with the same facility as such transactions ordinarily go forward at the hands of individuals or business corporations. Such an incorporation was undoubtedly a practical and helpful instrumentality for doing the work with which the government was confronted; but it is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and be able to contract with others, or to injure others, confident that

no redress may be had against it as matter of right, but only, if at all, as matter of the favor of the sovereign."

We feel that his comment directed toward the activities of the sugar corporation applies equally as well to the activities of the Emergency Fleet Corporation.

In the case of

Sales vs. the United States, 234 Fed. 842,

an employee of the Panama Railroad Company was indicted for conspiracy to defraud the United States on the theory that he had defrauded the railroad company, which company was owned entirely by the United States Government. The theory of the United States was that the Panama Railroad Company is a governmental department and that the defendant was an officer of the United States. The United States was the owner of the whole capital stock of the railroad company, absolutely dominating it and solely interested in its profits and losses. Circuit Judge Ward in his opinion held that a conspiracy though proved against the railroad company would not be conspiracy against the United States, stating as his reasons that although the government absolutely owns the Panama Railroad Company and is the only person profiting or losing by its activities, still the railroad company sues and is sued, just like any other corporation, in its own name. While the foregoing case does not pass upon the status of the Emergency Fleet Corporation, yet

the reasoning applies equally as well to the case at bar.

As a further and almost conclusive argument that the Emergency Fleet Corporation is not in fact a governmental department, or arm, we cite the case of

United States vs. Strang, 6 Advance Opinions U. S. Supreme Court, page 174;

we quote from the opinion of Mr. Justice McReynolds, at page 175:

> "Counsel for the government maintain that the Fleet Corporation is an agency or instrumentality of the United States, formed only as an arm for executing purely governmental powers and duties vested by Congress in the President, and by him delegated to it; that the acts of the Corporation within its delegated authority are the acts of the United States; that therefore, in placing orders with the Duval Company in behalf of the Fleet Corporation, while performing the duties as inspector, Strang necessarily acted as agent of the United States.
>
> "The demurrer was properly sustained.
>
> "As authorized by the Act of September 7, 1916 (39 Stat. at L. 728, Chap. 451, Comp. Stat. 8146a, Fed. Stat. Anno. Supp. 1918, p. 785), the United States Shipping Board caused the Fleet Corporation to be organized (April 16, 1917) under laws of the District of Columbia with $50,000,000 capital stock, all

owned by the United States, and it became an operating agency of that Board. Later, the President directed that the Corporation should have and exercise a specified portion of the power and authority in respect of ships granted to him by the Act of June 15, 1917 (40 Stat. at L. 182, chap. 29), and he likewise authorized the Shipping Board to exercise through it another portion of such power and authority. See *The Lake Monroe* (*Re United States*), 250 U. S. 246, 252, 63 Ld. ed. 962, 966, 39 Sup. Ct. Rep. 460. The Corporation was controlled and managed by its own officers, and appointed its own servants and agents, who became directly responsible to it. Notwithstanding all its stock was owned by the United States, *it must be regarded as a separate entity.* Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the Corporation only, and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment of Sec. 41."

We are not unmindful of the holding of this Court in

Ballaine vs. Alaska Northern R. R. Co., 259 Fed. 183.

But we feel that the wide difference between the act authorizing the acquisition of the Alaska Northern R. R. and the act creating the Emergency Fleet Cor-

poration offers adequate grounds for distinguishing the two situations.

Viewing this controversy from the inception of the bill creating the Emergency Fleet Corporation to the present day, we find Congress contemplating the formation of a separate entity—a commercial proposition. The act actually created a separate entity, capable of suing and being sued, with 49% of its stock capable of being owned by private individuals; a later act of Congress declared it a government establishment only for a particular purpose. The corporation itself has sued in its own name,

> (*United States Shipping Board Emergency Fleet Corporation vs. Kinney*, 254 U. S. 663).

A great mass of judicial opinion has declared it to be a separate entity. With such an array of evidence we are drawn to the irresistible conclusion that the corporation is in truth a separate entity and not a governmental department. That being a separate commercial entity, it should litigate its controversies in its own name and that discretion or authority to bring suits otherwise does not reside elsewhere.

II.

In answer to the third contention of plaintiff in error we feel that counsel have mistaken the import of the sections of the Shipping Act of 1920, quoted in their brief. The provisions of Section 2 of that act which counsel contend repealed the act creating the Emergency Fleet Corporation, and

which they contend transferred to the United States Shipping Board all rights, interests, remedies, etc., of the Emergency Fleet Corporation, as well as the adjusting of all claims arising out of dealings had by the Corporation, do not in fact apply in any sense of the word to the Emergency Fleet Corporation.

A careful reading of the Act of June 5, 1920, discloses no evidence whatever of any intent to repeal Section 8146-F, U. S. Comp. Statutes annotated, being Sec. 11 Shipping Act 1916, the section under which the Emergency Fleet Corporation was created.

In the repealing section of the act of June 5, 1920, the only reference made to the shipping act of Sept. 7, 1916, is that Sections 5, 7 and 8 thereof are repealed.

The sections so repealed by the act of June 5, 1920, made no reference whatever to the Emergency Fleet Corporation. Section 5 of the Act of Sept. 7, 1916, merely authorized the Shipping Board to have constructed and equipped, or to purchase, lease or charter or repair certain vessels. No reference whatever is made to the creation of the Emergency Fleet Corporation.

Section 7 of said act provided merely for the sale, lease or charter of any such vessels to a citizen of the United States. Section 8 provided for the method of selling vessels unfit for service. Neither said section 7 or 8 refer in any manner to the Emergency Fleet Corporation.

Certainly there are no expressed terms in the Act of June 5, 1920, repealing Section 11 (8146-F, U. S. Comp. Statutes annotated) of the act of Sept. 7, 1916, and in the absence of expressed terms the presumption at law is that no repeal was intended.

36 Cyc. 1071.

Not only did the act of June 5, 1920, contain no expressed terms repealing the act creating the Emergency Fleet Corporation, but on the contrary it expressly provided for the continued existence of the Emergency Fleet Corporation.

See Section 12 and Section 35, act of June 5, 1920.

The sections quoted by plaintiff in error refer and apply only to the sections repealed, to-wit, sections 5, 7 and 8, of Shipping Act of 1916, and hence provide only for adjustment of disputes arising under those provisions.

Therefore the third contention of plaintiff in error is based upon a mistaken interpretation of Sec. 2 of the Act of June 5, 1920.

CONCLUSION.

Viewing this whole question from a common-sense standpoint, what valid reason is there why the Emergency Fleet Corporation cannot bring this suit in its own name? It is capable of suing and being sued. It alone participated in the business dealings out of which this controversy arose. If it has a valid claim, it can bring its own suit for the enforcement of its rights. If the defendants in error have a valid counter-claim they can then assert it against the party with whom they dealt. By such a proceeding the interests of both the United States and the Emergency Fleet Corporation would be protected and the defendants in error would not be subjected to the cumbersome and uncertain if not impossible procedure of proving their claims against the United States. Honorable and common justice would thus be preserved to all the parties concerned.

JAMES P. WETER,
F. M. ROBERTS,
WM. G. LONG,
Attorneys for Defendants in Error.

Italics in this brief are ours.